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IN THE

Supreme Court of the United States

October Term, 1962

No. 518

WILLIAM A. CROWE,
Trading as William A. Crowe Company, *Petitioner*

vs.

RAGNAR BENSON, INC.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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No.

WILLIAM A. CROWE, Trading as William A. Crowe Company, *Petitioner*

vs.

RAGNAR BENSON, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

William A. Crowe, trading as William A. Crowe Company, your petitioner, prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit dismissing petitioner's appeal taken from the judgment of the United States District Court for the Western District of Pennsylvania.

OPINION BELOW

The Opinion of the Court of Appeals has not yet been reported. A copy of the majority opinion constitutes Appendix A to this petition for a Writ of Certiorari. A copy of the dissenting opinion of Circuit Judge McLaughlin is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1962, and petitioner filed a Petition for Rehearing which was denied by the Court of Appeals for the Third Circuit on September 10, 1962. The jurisdiction of this court is invoked under 28 U. S. C. A. 1254 (1) and Supreme Court Rule 19 1(b).

QUESTION PRESENTED

When a District Court Judge abuses his discretion and acts arbitrarily in vocating a default civil judgment, is the order vocating the judgment appealable to the Court of Appeals?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

The statutes and rules of Civil Procedure are set out as Appendix C.

STATEMENT OF THE CASE

The complaint in this civil suit was filed on June 6, 1960. The summons was duly served on June 7, 1960. After service, an attorney, saying, he represented the defendant, telephoned petitioner's attorney and asked him for an extension of time to answer. Petitioner's attorney said that he would agree to any reasonable extension of time. The other attorney sent a letter to petitioner's attorney, saying, he would have an order, prepared to be executed by the Court and signed by petitioner's attorney, the early part of the week beginning June 20, 1960. This was not done and no answer or other pleadings were filed on behalf of the defendant. The Clerk of the District Court advised the defendant corporation of this fact, and also that the case would be called for trial in January or February of 1961. The Clerk told defendant corporation there was no appearance entered for it and suggested that the defendant corporation obtain counsel. Petitioner's attorney was notified by the Clerk that the action would be tried during the week of February 13, 1961. On that date, almost eight months from the inception of suit, petitioner, pursuant to the Federal Rules of Civil Procedure, secured a default and the entry of a judgment by default in the amount of $35,603.37. Notice of the entry of said judgment was mailed to defendant corporation by the Clerk of the District Court.

There were no further proceedings until six months later when execution was issued. It was only after that, on September 8, 1961, that the attorney entered an appearance on behalf of the defendant and moved to vacate the judgment under Rule 60(b) of the Federal Rules of Civil Procedure.

Thereafter there was an informal argument on said motion before the District Court Judge. There was on testimony. That procedure was directly contrary to Rule 5 of the Local Rules of the District Court, which

required that the motion be assigned to the next session of the particular branch of the court. In the course of the informal proceedings, the District Judge stated: "I think counsel for the defendant was groosly derelict in duty in not complying with the provisions of law as they exist in the United States Courts." He further said, "Should the Court exercise discretion and grant relief where a defendant flagrantly fails to comply with the rules of this Court and flagrantly pays no attention to letters that go out from the Clerk of Court and a default judgment is entered?" The District Court Judge then entered an order vacating the judgment on the condition that the petitioner's attorney be paid $750.00 In the order setting aside the judgment, the District Judge gave as his reason: "For the reasons set forth in hearing held September 12, 1961."

On September 26, 1961, petitioner appealed from the order reopening the judgment and the appeal was duly docketed in the Court of Appeals for the Third Circuit. The original record of the litigation was promptly mailed by the Clerk of the District Court to the Third Circuit Court for filing. On November 13, 1961, while the case was on appeal to the Third Circuit, the District Court Judge entered an order in the matter postponing a pretrial conference. In that order the court said, "* * * it was my judgement that the interests of justice required that said default judgment be lifted." This was the first and only time such reason was assigned by the court to its order of more than a month previous.

Within the time required by the Rules of the Third Circuit Court of Appeals, petitioner filed with the Clerk of the Court of Appeals, at Philadelphia, the printed briefs and appendices for appellant. After proper service and subsequent to the filing of the briefs and appendices by your petitioner, and after notice, defendant-appellee presented to the Third Circuit Court at a regular motion day on December 18, 1961, a motion to dismiss the appeal for the reason that the appeal was interlocutory and not

final and that the Third Circuit Court was without jurisdiction. On January 9, 1962, the Third Circuit Court of Appeals denied said motion and on January 9, 1962, disposed of the case on the merits by affirming the judgment of the District Court.

The Circuit Court of Appeals granted petitioner's Petition for Rehearing vacated its judgment and heard the case on the merits before a division of the Court consisting of Judges McLaughlin, Kalodner and Hastie. The Court, in an Opinion by Circuit Judge Kalodner dismissed the appeal holding that the order of the District Court vacating the default judgment was a nonappealable interlocutory order, and that the Circuit Court was without jurisdiction. Circuit Judge McLaughlin dissented, holding that the District Court Judge's order setting aside the judgment in this case was an abuse of discretion and arbitrary, and therefore it was appealable.

Petitioner presented a Petition for Rehearing which was denied on September 10, 1962.

REASONS FOR GRANTING THE WRIT

1. There is a Conflict Among the Courts of Appeals as to Whether or Not an Order entered Arbitrarily, Capriciously and With Abuse of Discretion in Setting Aside a Default Judgment, is Final and Therefore Appealable to the Court of Appeals.

2. The Lower Court's Arbitrary and Capricious Act and Abuse of Discretion in Opening and Vacating Said Civil Judgment Calls for the Exercise of Your Honorable Court's Power of Supervision and Conflicts With the Decision of Your Honorable Court in *Phillips vs. Negley*, 117 U. S. 665, 6 S. Ct. Rep. 901.

ARGUMENT

In the case at bar the Court of Appeals for the Third Circuit was divided two to one on the issue as to whether or not the appeal was from a final order. Judge McLaughlin held that under the authority of the Third Circuit's own case of *Tozer vs. Krause Milling Co.*, (3 Cir. 1951), 189 F.2d 242, the order of the District Court was appealable while the majority of the court were of the opinion that the order of the District Court in vacating the default judgment was not appealable, citing its own earlier case of *United States vs. Agne*, (3 Cir. 1947) 161 F.2d 331.

Granting certiorari in the present case will give this Court an opportunity to resolve the conflict between the various Circuit Courts of Appeals on this point, and also serve to correct the Third Circuit Court of Appeals as to what is the law in the Third Circuit on the subject.

There is a conflict among the Circuits as to whether an order opening a default judgment entered arbitrarily and by a Judge who abuses his discretion is final and appealable. The 10th Circuit and the 5th Circuit have held that an order opening a default judgment which involves an abuse of discretion or is arbitrary is an error of law, and, therefore, final and appealable.

The 10th Circuit, in the case of *Western Union Telegraph Company vs. Dismang*, (1939) 106 F.2d 362, states as follows, page 362:

> "An application to open, vacate or set aside a judgment is within the sound legal discretion of the trial court and its action will not be disturbed by an appellate court except for a clear abuse of discretion. It is an abuse of discretion, however, to open or vacate a judgment where the moving party shows no legal ground therefor or offers no excuse for his own negligence or default. * * *"

The 5th Circuit, also has decided that such an order

is appealable in the case of *General Telephone Corporation vs. General Telephone Answering Service*, (1960), 277 F.2d 919, wherein the Court states in the language of the syllabus 2:

> "Exercise of discretion by Federal District Court in granting or denying motion of defaulting party to vacate default judgment will be interferred with by Court of Appeals only if there is an abuse."

The 8th Circuit in the case of *Altrichter vs. Shell Oil Company*, 263 F.2d 377, has decided that an abuse of discretion by a District Judge is error of law and reviewable by the Circuit Court of Appeals.

The 8th Circuit in *Tsai vs. Rosenthal*, 297 F.2d 614, stated the rule as follows:

> "Where the jurisdiction of the court to vacate judgment and grant a new trial is challenged, an appeal will lie to review the power or jurisdiction of the court to make such order. Phillips vs. Negley, 117 U. S. 665, 6 S. Ct. 901, 29 L. Ed. 1013; Cooper vs. Midwest Feed Products Co., supra; Jackson vs. Wilson Trucking Corp., 100 U. S. App. D. C. 106, 243 F.2d 212; Kanatser vs. Chrysler Corp. 10 Cir., 199 F.2d 610; City of Manning vs. German Ins. Co., 8 Cir., 107 F.52."

The 7th Circuit in the case of *Darlington vs. Studebaker-Packard Corp.*, 261 F.2d 903, has held such action by a District Judge is appealable in the following language:

> "* * * It is well established that such a motion is addressed to the sound legal discretion of the trial court and courts of appeal have frequently reviewed the exercise of such discretion, holding that the ruling on the motion will not be disturbed upon appeal except for an abuse of this discretion. * * *"

The 9th Circuit in the case of *Russell vs. Cunningham*,

279 F.2d 797, has recently held that an order denying a motion to vacate under Rule 60(b) is Reviewable on Appeal and will be set aside if an abuse of discretion is found.

The lower court lacked the power to vacate the default judgment which had been entered approximately seven months prior to any motion for relief. The application to vacate the judgment was made under Rule 60(b) of the Federal Rules of Civil Procedure. Since the court did not find any mistake, inadvertence or excusable neglect or any other legal or equitable reason for vacating said judgment, the court lacked the power to vacate or open the same. See *Phillips vs. Negley*, 117 U. S. 665, 6 S. Ct. 901.

Furthermore, petitioner was denied due process in that the matter was not set down for hearing, after answer, as provided for by Local Rule No. 5 of the District Court for the Western District of Pennsylvania. Such arbitrary action on the part of the District Judge calls for the supervision of your Honorable Court.

CONCLUSION

There being a conflict of decisions between the present decision of the 3rd Circuit Court of Appeals and that of the 5th Circuit and 10th Circuit and the other Circuits cited above on the same matter, and in order to correct an error of law and the arbitrary administration of justice, we respectfully submit that this petition for Writ of Certiorari should be granted.

VINCENT M. CASEY

Attorney for Petitioner

OPINION OF THE COURT

(Filed August 13, 1962)

APPENDIX A

By KALODNER, *Circuit Judge*

This is an appeal by the plaintiff, William A. Crowe, Trading as William A. Crowe Company, from an Order of the District Court for the Western District of Pennsylvania, vacating a default judgment in his favor in the amount of $35,603.37 against the defendant, Ragnar Benson, Inc., in a suit to recover for services performed under a contract between plaintiff and defendant in connection with the construction of the Gateway Park Garage, Gateway Center, Pittsburgh, Pennsylvania.

The complaint in this suit was filed on June 6, 1960. There followed a telephone conversation and an exchange of letters between plaintiff's counsel and defendant's counsel in which the former agreed to consent to a reasonable extension of time for the filing of an answer. Defendant's counsel was to prepare the necessary order for submission to the Court. The proposed order was never prepared. On December 29, 1960, the Clerk of the Court directly notified defendant by letter that the case would be called for trial in January or February, 1961. During this period defendant's counsel was unable to devote full attention to his practice because of serious illnesses of his mother and his wife. On February 13, 1961, no appearance having been entered by counsel for defendant and no answer having been filed, the Clerk of the Court entered judgment by default pursuant to plaintiff's application to do so. On September 8, 1961, following the issuance of a writ of execution on August 31 and the commencement of garnishment proceedings against defendant's bank accounts, defendant's counsel filed a motion to vacate the default judgment under Rule 60(b), Federal Rules of Civil Procedure, 28 U. S. C. A., and to stay the garnishment proceedings.

On September 13, following hearing had on the previous day, the District Court entered an Order granting defendant's motion to vacate the default judgment and terminating the garnishment proceedings conditioned upon defendant's payment to plaintiff's counsel of the sum of $750.00 within 24 hours. The Order further directed defendant to file an answer to plaintiff's complaint by September 18 and fixed November 13 for a pre-trial conference.

On September 13 defendant's counsel sent his check for $750.00 to plaintiff's counsel. On September 14 plaintiff's counsel advised the Clerk of the District Court of his receipt of the aforementioned check.* On September 18, the Clerk, pursuant to the terms of the District Court's Order, vacated the default judgment entered February 13, 1961. On September 26 plaintiff appealed. Subsequently, on November 13, the District Court entered an Order postponing until after disposition of plaintiff's appeal the pre-trial conference earlier fixed for that day. In this Order, the District Court stated that defendant's motion under Rule 60(b) had been granted "for the reason that the Court was of the view that since negotiations had previously been conducted by counsel for the parties and since counsel on behalf of the plaintiff knew of the identity of defendant's counsel and nevertheless proceeded to secure default judgment without apprising a fellow member of the bar of said fact or failing to have notice given to him through the United States Clerk of Courts, it was my judgment that the interests of justice required that said default judgment be lifted."

On this appeal plaintiff contends that the District Court (1) abused its discretion in vacating the default judgment and (2) acted arbitrarily in denying plaintiff an

*It is agreed by the parties that plaintiff's counsel was still in possession of the $750.00 check when the instant appeal was filed on September 26, 1961; that the check was not returned by plaintiff's counsel to defendant's counsel until December 1, 1961.

opportunity to answer defendant's motion under oath[1] and in failing to comply with its Local Rule providing that a motion filed on or before the third Wednesday of the month was to be heard by the miscellaneous judge during the following month.

In reply, defendant says that the District Court's Order vacating the default judgment is interlocutory and therefore not appealable. It further urges that the District Court did not abuse its discretion or act arbitrarily and that the Local Rule relied on by plaintiff was not applicable in view of the emergency situation created by the garnishment proceedings.

At the outset, it should be noted that plaintiff does not contend that the District Court acted beyond its jurisdiction in vacating the default judgment as was the case in Demeretz vs. Daniels Motor Freight, — F.2d — (3d Cir. 1962). Plaintiff asserts only that there was an abuse of discretion and certain procedural irregularities. With respect to these contentions, we need only say that we do not reach them since the Order of the District Court vacating the default judgment is a nonappealable interlocutory order, and accordingly we are without jurisdiction to entertain this appeal. United States vs. Agne, 161 F.2d 331 (3d Cir. 1947).[2]

Plaintiff requests that we treat the appeal as a petition for writ of mandamus or prohibition if we consider

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[1]Defendant's motion set forth the circumstances pertaining to the failure to enter an appearance and file an answer and was accompanied by an affidavit by defendant's counsel that the facts as stated were true. At the hearing before the District Court, plaintiff's counsel was afforded an opportunity to explain the circumstances surrounding the securing of the default judgment. The trial judge stated that he would treat counsel's explanation, although unsworn as having been made under oath, inasmuch as counsel was an officer of the Court.

[2]We cannot subscribe to the view expressed in the dissenting opinion that the Order vacating the default judgment is appealable under Tozer vs. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951). In that case the District Court *dismissed* a motion by the defendant to set aside a default judgment and the appealability of the District Court's action was not at issue since it was a "final decision" in that it *terminated* further proceedings. In the instant case the order vacating the default judgment was interlocutory inasmuch as it contemplated further proceedings in the lower court.

the Order nonappealable. Assuming, arguendo, that an appeal may be so treated, we are of the opinion that the use of the writ is inappropriate here. It is settled that "the extraordinary writs cannot be used as substitutes for appeals. . . ." Bankers Life & Casualty Co. vs. Holland, 346 U. S. 379,383 (1953). There are no "exceptional circumstances" here which would justify the issuance of the writ. LaBuy vs. Howes Leather Co., 352 U. S. 249,256,260 (1957); Green vs. Murphy, 259 F.2d 591, 594 (3d Cir. 1958).

For the reasons stated the appeal will be dismissed.

APPENDIX B

McLAUGHLIN, *Circuit Judge*, dissenting.

The setting aside of the judgment in this case was an abuse of discretion and arbitrary. Therefore it is appealable. Tozer vs. Krause Milling Co., 189 F.2d 242 (3 Cir. 1951).

The complaint in the suit was filed June 6, 1960. The summons was served June 7, 1960. After service, an attorney saying he represented the defendant telephoned plaintiff's attorney and asked him for an extension of time to answer. Plaintiff's attorney said he would agree to any reasonable extension of time. The other attorney sent a letter to plaintiff's attorney saying he would have an order prepared "to be executed by the Court and signed by you, the early part of the week beginning June 20, 1960." This was not done and no answer or other pleadings were filed on behalf of the defendant. The case appeared on the trial list for December 29, 1960. The district court clerk advised the defendant of this and that the case would be called for trial in January or February of 1961. The clerk told defendant there was no appearance entered for it and suggested it obtain counsel.

Plaintiff's attorney was notified by the clerk that the action would be tried during the week of February 13,

1961. On that date, almost eight months from the inception of suit, plaintiff had a default judgment entered. Notice of that was mailed defendant by the clerk. There were no further proceedings until six months later when execution was issued. It was only after that, on September 8, 1961, that the attorney entered an appearance on behalf of the defendant and moved to vacate the judgment.

Thereafter there was informal argument on the motion before the court. There was no testimony. That procedure was directly contrary to the district court rule which required the motion to be assigned to the next session of the particular branch of the court. The judge stated, "I think counsel for the defendant was grossly derelict in duty in not complying with the provisions of law as they exist in the United States Courts." He further said "Should the Court exercise discretion and grant relief where a defendant flagrantly fails to comply with the rules of this Court and flagrantly pays no attention to letters that go out from the Clerk of Court and a default judgment is entered?" Then he vacated the judgment on the condition that the plaintiff's attorney be paid $750. On September 13, 1961 an order setting aside the judgment on that term was entered "For the reasons set forth in hearing held September 12, 1961, * * *". A check was thereafter sent plaintiff's attorney which he refused to accept and returned to defendant's attorney.[1] On September 26, 1961 plaintiff appealed from the order reopening the judgment. The original record of the litigation was mailed by the district court clerk to this court for filing. On November 13, 1961 while the case was on appeal to this court the district judge

[1]After the judgment of the district court was affirmed by this court, on January 16, 1962, defendant's attorney again sent the check to plaintiff's attorney saying "Now in the light of the U. S. Court of Appeals action vacating the judgment against us, I am returning herewith the heretofore mentioned check pursuant to Judge Gourley's original order." On March 9, 1962, this court vacated its judgment above mentioned and relisted the appeal for argument which was had May 15, 1962. Plaintiff's attorney retained the check pending disposition of this appeal until July 26, 1962, on which date he again returned it to defendant's attorney.

entered an order in the matter postponing a pretrial conference. In that order the court said, "* * * it was my judgment that the interests of justice required that said default judgment be lifted." This was the first and only time such reason was assigned by the court to its order of more than a month previous.

On the bare statement of what actually happened there was both such abuse of discretion and arbitrary conduct on the part of the trial court "that the interests of justice" call for the reversal of the reopening of the judgment in question. This is no snap judgment which is before us. A most reputable attorney waited fifteen months before taking any final steps in the cause. The court found the other side guilty of gross negligence. It never accorded plaintiff an opportunity to protect his judgment but brushing aside its own salutary rule, peremptorily set aside the judgment and after that when the case was in this court on appeal ascribed as the reason for so doing "that the interests of justice required that said default judgment should be lifted." Under the facts the district court order cannot be fairly sustained.

APPENDIX C

28 U. S. C. A. § 1291 provides: §1291. "FINAL DECISIONS OF DISTRICT COURTS. The court of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands except where a direct review may be had in the Supreme Court."

28 U. S. C. A. Rule 60(b) Federal Rules of Civil Procedure: "(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of

review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."

CERTIFICATE OF SERVICE

I certify that I have served five copies of the foregoing Petition with SAMUEL GOLDSTEIN, *Esq.*, attorney for the defendant, personally.

_____

Attorney for Petitioner